

STATE OF NORTH DAKOTA
DEPARTMENT OF AGRICULTURE

IN THE MATTER OF:)	
)	
Harley Hiam,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND ORDER
)	
Case No. 03-064)	OAH File No. 20030431
.....		

On November 5, 2003, an Administrative Complaint (“Complaint”) was filed with North Dakota Department of Agriculture (“Department”) by it Deputy Commissioner, Jeff Weispfenning, requesting administrative action against Harley Hiam. The Complaint cites as grounds for administrative action two violations of N.D.C.C. § 4-35-15(2).¹

On December 30, 2003, the Department requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to preside as hearing officer, *i.e.*, to conduct a hearing and to issue findings of fact and conclusions of law, as well as a final order for the Commissioner of Agriculture in regard to the Complaint. On January 5, 2004, the undersigned ALJ was designated to preside. In the request, the Department asked the hearing officer to hold off scheduling the matter for hearing until spring when the Respondent returned to North Dakota.

On February 17, 2004, the ALJ issued a Notice of Hearing. The hearing was held as scheduled on May 20, 2004, in the Office of Administrative Hearings, Bismarck, North Dakota.

¹ Page 2 of the Administrative Complaint also cites to N.D.C.C. § 4-35-15(5), but on pages 2 and 3, only allegations of violation of § 4-25-15(2) are specifically alleged.

The Department was represented by Assistant Attorney General Dean J. Haas. The Department called three witnesses, including the investigating pesticide inspector, Joel Owen, the Respondent, Harley Hiam (“Harley”), and Harley Hiam’s son, Jerry Hiam (“Jerry”). Harley was present at the hearing. He represented himself at the hearing. He testified in his own behalf and called one further witness, a neighbor, Ronald Bergemann. Eighteen exhibits were offered, but only seventeen were admitted. *See* attached exhibit list. The Department offered exhibits 1-15, all of which were admitted. Harley offered exhibits 16-18, but exhibit 18 was not admitted over a relevance objection.²

At the close of the hearing the ALJ heard oral argument from the Department and Harley.

Based on the evidence presented at the hearing and the oral argument of the parties, the administrative law judge makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

1. Harley is a farmer who lives south of Lisbon North, Dakota. His son, Jerry, from who he is estranged, lives in a house on adjoining property just north of Harley’s property. Their respective homes (Harley lives in an RV in a shed only in the summer, and in his RV in Arizona in the winter) are about 75 yards apart. *See* Exhibit 4.

2. Harley at one time was a certified pesticide applicator in North Dakota but is not now certified to apply restricted used pesticides in North Dakota. He now applies pesticides only for his own use.

3. Jerry filed a pesticide complaint against Harley in the spring of 2003. *See* exhibit 7.

² After the hearing, the Hearing Officer received a letter from Harley enclosing eight pictures. These were sent *ex parte* and are not helpful for a decision in this matter. They are not admitted as evidence.

4. Department Inspector Joel Owen investigated and took statements from both Jerry and Harley in June of 2003. Exhibits 7 and 8; *see* Owen's report, exhibit 3, and Harley's response to the Administrative Complaint, exhibit 2.

5. In June 2003, Owen took pictures of alleged pesticide damage on Jerry's property, and of chemical and equipment allegedly used by Harley to spray his property. Exhibits 10 and 14.

6. Harley took pictures this year (2004) of the Hiam properties. Exhibit 16.

7. In June 2003, as part of his investigation, Owen took tissue samples from plants on Jerry's property, took soil samples from the ground on Jerry's property, and took a tank sample from Harley's spray tank. Sample testing results were obtained from all of these samples. Exhibits 5 and 6.

8. In 2003, Owen investigated further by obtaining weather information regarding conditions on or near the Hiam properties on May 20 and May 29, 2003. Exhibits 11 and 15.

9. Jerry testified that he actually saw Harley spraying in the yard around Harley's house on May 20, 2003, and that, although he did not actually see Harley spraying in his yard on May 29, 2003, he saw Harley's spray equipment in Harley's yard on that day, all ready for use. Jerry testified that he smelled pesticide in the air in his yard on both May 20 and May 29, 2003.

10. Harley admitted spraying the pesticide Curtail in his yard in the spring of 2003 on at least one occasion, possibly more, but he does not recall the date or dates of the spraying. On exhibit 4, the cross-hatch in blue pen shows the areas in his yard that Harley admits spraying that spring, which includes areas right next to Jerry's property. Curtail is not a restricted use pesticide.

11. The plant tissue and soil samples taken by Owen were taken from the spots marked with a red "X" on exhibit 4.

12. Jerry testified that Harley has been spraying in his own yard near Jerry's yard several times during the last 4-5 years and that he believes that he has lost several trees to pesticide spray drift over that time period.

13. The pictures taken by Owen, along with Owen's and Jerry's testimony show pesticide effects on the trees and weeds in Jerry's yard in 2003.

14. The evidence of sample analysis shows fairly high detectable levels of the active ingredient of Curtail in plant samples, but not in soil samples, taken from Jerry's property. Exhibits 5 and 6. Harley admits applying Curtail in the spring of 2003 and a sample taken from his tank shows he applied Curtail. Jerry denies applying any Curtail in 2003.

15. Jerry has ornamental plants, trees, a hedge row of trees, and a grass yard with a substantial dandelion infestation in it. His property amounts to about a 3 acre plot carved out of the original Hiam property.

16. The NDAWN weather information data shows winds capable of causing drift of pesticide from Harley's property to Jerry's property on May 29, but not on May 20, 2003. Exhibit 11. On May 29, the winds were likely out of the southwest, west-southwest, or south-southwest, from speeds of about 13 mph to 26 mph most of the day.

17. Both Hiam properties are in an agricultural setting but Harley was spraying in the spring of 2003, likely on May 20 and May 29, in the yard around his own residence and near Jerry's residence, not on agricultural lands, though Harley noted that most of his spraying in 2003 was on his CRP land.

18. The label for Curtail (exhibit 9) contains advisory statements including the following:

Avoiding Injury to Non-target Plants: This product can affect susceptible broadleaf plants directly through foliage and indirectly by root uptake from treated soil. Therefore, do not apply Curtail directly to or allow spray drift to come in contact with flowers, grapes, tomatoes, potatoes, beans, lentils, peas, alfalfa sunflowers, soybeans safflower, or other desirable broadleaf crops and

ornamental plants or soil where these sensitive crops will be planted the same season.

Avoid Spray Drift: Avoid spray drift since very small quantities of the spray, which may not be visible, may severely injure susceptible crops during active growth or dormant periods. Use coarse sprays to minimize drift...

Exhibit 9, at 2 (pink highlighted)

19. N.D.C.C. § 4-35-15 states, in part, as follows:

4-35-15. Unlawful acts - Grounds for denial, suspension, or revocation of a certification.

The commissioner, after providing an opportunity for a hearing, may deny, suspend, revoke, or modify any provision of any certification issued under this chapter, if the commissioner finds that the applicant or the holder of the certification has committed any act listed in this section. Each of the following acts is a violation of this chapter, whether committed by an applicant, by the holder of the certification, or by any other person applying or using pesticides, if the person:

2. Made a pesticide recommendation, application, or use inconsistent with the labeling or other restrictions prescribed by the board.

5. Operated in a faulty, careless, or negligent manner.

20. N.D.C.C. § 4-35-23 states, in part, as follows:

4-35-23. Penalties.

4. A person who violates a provision of this chapter or the rules adopted under this chapter is subject to a civil penalty not to exceed five thousand dollars for each violation. The civil penalty may be imposed ...by the agriculture commissioner through an adjudicative proceeding pursuant to chapter 28-32...

21. In February 2001, the Department filed another pesticide Complaint against

Harley. As a result of that Complaint, Harley and the Department entered into an Administrative

Stipulation and Consent Agreement (“Agreement”). Exhibit 13. A part of the Agreement suspends payment of \$750 of civil penalty provided that Harley commits no further violations of the pesticide laws of North Dakota within five years. Whether five years is measured from the date of the allegations of violation of that Complaint (September 2000) or from the date of the last signature of the Agreement (May 21, 2001), five years has not yet passed.

22. In the Administrative Complaint and at the May 20, 2004, hearing, the Department recommended a civil penalty be imposed for proven violations of N.D.C.C. ch. 4-35 of \$1,750, \$1,000 for the further (2003) violations, and \$750 for imposition of the suspended civil penalty.

CONCLUSIONS OF LAW

1. The Complaint of the Department filed against Harley is an adjudicative proceeding pursuant to chapter 28-32.

2. Although Harley is not a certified applicator of pesticides whose certification is subject to regulation under N.D.C.C. ch. 4-35, he was an applicator of pesticides in the spring of 2003, likely on May 20 and May 29, 2003. Therefore, pursuant to N.D.C.C. § 4-35-15, he is prohibited from committing certain acts enumerated in that section. Also, pursuant to N.D.C.C. § 2-35-23, for violations of N.D.C.C. ch. 4-35, Hiam may have imposed on him as the result of an adjudicative proceeding, a civil penalty, not to exceed five thousand dollars, for each violation proven.

3. The evidence shows, by the greater weight of the evidence, that on May 29, 2003, Harley likely applied the pesticide Curtail on his own property in violation of the Curtail label. Harley’s application of Curtail was a violation of the Curtail label because it was an application near ornamental plants on Jerry’s property under such conditions as would allow drift to such ornamental plants, *i.e.*, in an area near Jerry’s residence. Further, the evidence shows that

Hiam's application of Curtail was a use that, indeed, caused drift of Curtail onto Jerry's property causing some damage to plants, and the active ingredient of Curtail was found, as a result of independent testing, in plants on Jerry's property. Although the Department alleges that Harley's application of Curtail is two separate and distinct violations of N.D.C.C. § 4-35-15(2), it does not appear that the language of that subsection is worded in such a way to recognize two separate and distinct violations in this Administrative Complaint resulting from Harley's application, *i.e.*, two separate and distinct violations, one for the labeling violation and one for the resulting spray drift. Perhaps, there is another provision of law that recognizes a separate and distinct violation for the resulting spray drift from a pesticide application, (*e.g.*, N.D.C.C. § 4-35-15(5)), but a separate and distinct violation does not appear to be contained within N.D.C.C. § 4-35-15(2), itself, which is the only section in the Administrative Complaint specifically alleged to have been violated. N.D.C.C. § 4-35-15(2) does additionally allow for violations because of a "pesticide recommendation, application, or use inconsistent with ... other restrictions prescribed by the board" but no such other restrictions were specifically implicated as part of the allegation in the Administrative Complaint. Nonetheless, the evidence does show a labeling violation that occurred as a result of Harley's application, and it shows that that labeling violation did result in pesticide spray drift onto the Jerry's property causing an undetermined amount of damage to at least some of his plants. It is all really part and parcel of the same violation for the purposes of this Administrative Complaint, a labeling violation. Perhaps additional specific allegations could have resulted in a finding of more than one violation.

3. Therefore, as a result of the proven labeling violation of N.D.C.C. ch. 4-35, pursuant to N.D.C.C. § 4-35-23, the Commissioner of Agriculture, and through him his designated hearing officer, may impose a civil penalty of not more than five thousand dollars against Hiam, for the proven violation.

4. Pursuant to the Agreement, as a result of a further violation of the pesticide laws of the State of North Dakota by Harley within five years, Harley is subject to both the civil penalty imposed as a result of the further violation, as well as the suspended civil penalty imposed as part of the Agreement. The Commissioner of Agriculture, and through him his designated hearing officer, may impose a \$1,000 civil penalty for the 2003 violations and the \$750 civil penalty suspended under the Agreement.

ORDER

The evidence of record has been considered and appraised. The greater weight of the evidence shows that Harley Hiam violated the provisions of N.D.C.C. ch. 4-25 in 2003 as set forth in the findings of fact and conclusions of law. It is HEREBY ORDERED that Harley Hiam pay a civil penalty for this violation in the amount of \$1,750, which includes a \$1,000 civil penalty for the violation in 2003 of N.D.C.C. ch. 4-35, proven as a result of the May 20, 2004, hearing, and \$750 because the violation of N.D.C.C. ch. 4-35 in 2003 was a further violation of N.D.C.C. ch. 4-35, within five years under the terms of the May 2001 Administrative Stipulation and Consent Agreement. The terms of payment of the \$1,750 civil penalty will be stated by the Commissioner of Agriculture by separate letter.

Dated at Bismarck, North Dakota this 27th day of May, 2004.

State of North Dakota
Roger Johnson
Commissioner of Agriculture

By: _____
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